

**IN THE SUPREME COURT OF NOVA SCOTIA**

**Citation:** Nova Suites Properties Ltd. v. Mueller, 2008 NSSC 309

**Date:**20081022

**Docket:** SH 252544

**Registry:** Halifax

**Between:**

Nova Suites Properties Limited, a body corporate

Plaintiff/Defendant by  
Counterclaim

and

Joerg Mueller and Gudula Mueller

Defendants/Plaintiffs by  
Counterclaim

---

DECISION

---

**Judge:** The Honourable Justice Kevin Coady

**Heard:** September 15-17, 2008, in Halifax, Nova Scotia

**Decision:** October 22, 2008

**Counsel:** Navid Saberi, self-represented for the plaintiff  
Mark Taylor, for the defendants

**By the Court:**

[1] On May 11, 2004 the parties signed an Agreement of Purchase and Sale.

The agreement essentially involved the exchange of properties. The Muellers were anxious to sell their lodge property located at Molega Lake, Nova Scotia. The plaintiff was desirous of acquiring the property as a recreational asset.

[2] The plaintiff and its principal, Navid Saberi, were in the process of developing a large condominium project on Walter Havill Drive in Halifax. They were prepared to pay for the Molega Lake property by the transfer of a fully completed and furnished penthouse unit. The agreement called for closing Molega Lake “on or before (5) five days after acceptance of this agreement”. It called for the closing of the condominium “10 days after the registration of the condominium corporation or October 15, 2004, whichever is later.”

[3] It was never the Mueller’s intention to move into the penthouse condominium. They were experiencing great difficulty selling Molega Lake for an amount sufficient to pay off their two mortgages and other related expenses. The condominium presented as an easier sale and would produce sufficient funds to pay

off their debts. This unique arrangement created a number of issues that the Agreement of Purchase and Sale anticipated.

- Mr. Saberi would close and take possession of Molega Lake in May, 2004 without payment save for a \$50,000 “occupancy fee”.
- The Muellers would not close the condominium for several months and therefore were not able to sell it to realize the proceeds of the Molega Lake sale.
- The Muellers would not be able to pay out their Molega Lake mortgages until they sold the condominium. Consequently, Mr. Saberi would take title to Molega Lake subject to the two mortgages.
- The mortgages would require monthly payments between the sale of Molega Lake and the sale of the condominium.
- The Muellers would be entitled to compensation for Mr. Saberi’s occupation of Molega Lake between closing dates.

- The Muellers would require assurance that the condominium would sell for the \$300,000 they were to receive for Molega Lake.
- Mr. Saberi would require assurance that when the Muellers sold the condominium, the two mortgages on Molega Lake would be satisfied from the proceeds.

[4] The following are the paragraphs of the agreement that responded to the above factors:

1. The Purchaser having inspected the following described property including the contents previously viewed (hereinafter called the Property) hereby offers to purchase from Vendor 501 Uhlmad's Point Road, PID Numbers 70144886 and 70148333 (know as Beaver Lodge Molega Lake) which is more particularly described in the legal description and plan attached hereto as Schedule A, at the purchase price as follows:

- (a) The Purchaser shall cause the Purchase Price to be paid by transfer and conveyance to the Vendor from the Purchaser of a fully finished condominium unit being unit number 1010 free and clear of all encumbrances in the condominium known as Roxbury Condominiums Inc. located in the Halifax Regional Municipality, Province of Nova Scotia (hereinafter called the "Condominium Unit"). The Condominium Unit shall be conveyed ten (10) days after the registration of the condominium corporation on October 15<sup>th</sup>, 2004, whichever later (hereinafter referred to as the "Condominium Unit Closing Date")

2. The Purchaser covenants and agrees it will be responsible for the mortgage payments with respect to the first mortgage on the Property from the Closing Date until such time as Condominium Unit has been transferred to the Vendor on the Condominium Unit Closing Date. The Vendor confirms there is currently a registered first mortgage and second collateral mortgage over the Property.

3. The Purchaser further covenants and agrees that it shall pay an occupancy fee in the amount of Fifty Thousand Dollars (\$50,000.00) to the Vendor for the occupation and use of the Property until the Condominium Unit Closing Date, which occupancy fee shall be paid on the Closing Date of the property.

4. The Vendor covenants and agrees, as collateral security for the payout of the first mortgage and second collateral mortgage over the Property, that they shall grant a collateral mortgage to the Purchaser over the Condominium Unit on the Condominium Unit Closing Date. The parties acknowledge and agree a full release of this collateral mortgage shall be held by the Vendor's lawyer in trust and it shall be automatically recorded without further consideration once the first mortgage and second collateral mortgage over the Property has been paid out by the Vendor, and full mortgage releases have been recorded by the Vendor.

5. This Agreement shall be completed on or before five (5) days after acceptance of this Agreement (hereinafter called the Closing Date).

[5] The following paragraphs appear as appendix "A" to the Agreement of Purchase and Sale:

Navid Saberi will execute a personal guarantee guaranteeing to the Vendor a total net resale price in the amount of Three Hundred Thousand Dollars (\$300,000.00) on the resale of Condominium Unit 1010 in Roxbury Condominiums Inc. Navid Saberi further guarantees that the resale of Condominium Unit 1010 and the delivery of the net resale proceeds to the Vendor shall occur no later than January 31, 2005.

The Vendor shall execute a guarantee to the Purchaser guaranteeing that upon receipt of the sale proceeds of Three Hundred Thousand Dollars (\$300,000.00) on the sale of the above noted condominium that they will pay off the first mortgage and second collateral mortgage on the Property in Molega Lake and will obtain and record a full release of the first mortgage and second collateral mortgage.

[6] Neither the Molega Lake property nor the condominium closed. This lawsuit is primarily a dispute over the \$50,000.00 occupancy fee which was paid to the Vendors solicitor in trust on May 21, 2004 and subsequently released to the Muellers.

[7] The first correspondence related to closing Molega Lake was a letter from the Purchasers' solicitor to the Vendor's solicitor on May 21, 2004. It enclosed the \$50,000.00 fee "in escrow until we receive the following:"

1. Your undertaking to record the Warranty Deed;
2. Certificate of Title (yet to be reviewed and confirmed);
3. HST Certificate;
4. Direction and Authorization;
5. Keys to the property;
6. Your undertaking to have the personal guarantee (previously provided) executed by your clients Jorg Mueller and Gudula Mueller and the original returned to our office;
7. Your undertaking to have the collateral mortgage (previously provided) executed and held in trust by your firm and recorded against title of

condominium unit 1010 Roxbury Condominiums Inc. on the Condominium Unit closing date;

8. Your undertaking on receipt of the \$300,000.00 net proceeds on the resale of Condominium Unit 1010 to pay off the first and second mortgages registered against the Molega Lake Property and any other encumbrances as referred to in your Certificate of Title and record full releases of mortgages/encumbrances at the Registry of Deeds in Bridgewater.

[8] I find as a fact that around this time Mr. Saberi obtained the keys to Molega Lake and took possession. In the May 21, 2004 letter Mr. Saberi's solicitor wrote "Mr. Saberi would like to have the keys released today, as he has cleaners to go to the Molega property over the weekend." I also accept Mr. Mueller's evidence that he gave the keys to Mr. Saberi in May, 2004.

[9] On May 21, 2004 the Muellers executed the personal guarantee in favour of Mr. Saberi. On May 28, 2004 the Muellers executed the Warranty Deed to Molega Lake, a direction to pay and the HST Certificate. On June 2, 2004 counsel for the Muellers' signed the Certificate of Title to the Molega Lake property. The last item was required as Mr. Saberi's counsel requested the Muellers' counsel to register the deed.

[10] On May 27, 2004 the Muellers' solicitor requested that the Saberi guarantee as well as postdated cheques for payment of the first mortgage for June through

October, 2004. The record establishes that the Saberi guarantee was executed in “June 2004.”

[11] The Muellers’ counsel forwarded a closing letter to Mr. Saberi’s counsel on June 4, 2004. The significance of this letter to this ruling is such that I reproduce it in full.

June 4, 2004

File No: TS04374

Stephen D. Ling  
Landry McGillivray  
Barristers and Solicitors  
300-33 Ochterloney Street  
P.O.Box 1200  
Dartmouth, N.S.  
B2Y 4B8

BY FAX - 1-902-463-0590 AND BY COURIER

Dear Mr. Ling:

**RE: Nova Suites Properties Limited and Mueller  
Beaver Lodge, Molega Lake, Queens County, Nova Scotia**

Please now find enclosed:

1. Warranty Deed
2. H.S.T. Certificate
3. Statement of Adjustments
4. Direction



5. Personal Guarantee signed by the Muellers
6. Our account for services rendered for certifying the title to yourselves
7. Certificate of Title as amended

Please hold these documents in escrow until you have delivered to our firm, the following:

1. Original signed guarantee executed by your client
2. Postdated cheques for the mortgage payments to Scotia Mortgage Corporation for \$1,186.96 for June 1, July 1, August 1, September 1, and October 1, 2004
3. Your trust cheque in the amount set forth in the Statement of Adjustments enclosed herewith
4. Confirmation that your client has arranged fire insurance, with loss payable to Scotia Mortgage Corporation and Kreissparkasse Esslingen, as their interest may appear.
5. Your cheque in payment of our account

We will undertake:

1. To pay all outstanding real property taxes assessed against Assessment Account Numbers 8401578 and 1014528 (copies of bills attached).
2. We will pay the outstanding two mortgages on the Molega Lake Property to Scotia Mortgage Corporation and Kreissparkasse Esslingen once we are in receipt of the sale proceeds of the Condominium Unit 1010 Roxbury Condominiums Inc. and record Releases of the mortgages at the Registry of Deeds at Liverpool, N.S.

We hereby confirm that we are holding a signed mortgage for Condominium Unit 1010 in our file and will undertake to record the same immediately after the deed to our clients for Unit 1010 once we are provided with the deed.

Yours truly,

TAYLOR & SILVER

Mark A. Taylor

:cav  
Enclosures

P.S. I will telephone you to advise when I have received your package and it is in order for you to release the documents.

M.A.T.

[12] I conclude that as of June 4, 2004 the Muellers' counsel had complied with all escrow conditions associated with the \$50,000.00 transfer of May 21, 2004. The three undertakings were confirmed in the last three paragraphs of the June 4, 2004 closing letter. The keys had already been delivered to Mr. Saberi. The undertaking to register the Warranty Deed was obviously changed to forwarding the Warranty Deed. This is reflected in Mr. Saberi's counsel's letter of June 2, 2004 which states "as previously discussed our office will be attending to the registration of the deed."

[13] I conclude that the only escrow existing as of June 4, 2004 attached to the purchaser's solicitor. He was not permitted to release the deed for registration until he provided Mr. Saberi's guarantee, the post dated cheques for the mortgage, confirmation of fire insurance and the payment of two small accounts.

[14] It appears as if the Muellers' June 4, 2004 closing letter was faxed to Mr. Saberi's counsel on June 2, 2004 for the purposes of review. In a reply letter, also dated June 2, 2004, it is stated "thank you for your closing letter of June 2, 2004

faxed today.” I find as a fact that the Muellers’ letter and attachments were forwarded to Mr. Saberi’s counsel in time for a June 4, 2004 closing.

[15] The closing of Molega Lake did not occur on June 4, 2004 because the purchaser did not satisfy his side of the transaction. In the June 2, 2004 letter Mr. Saberi’s counsel stated “kindly forward the original deed with your courier package which we will hold in escrow until we have delivered to you the following undertakings.” He then lists the five items set forth in the Muellers’ letter of June 4, 2004. He completes this letter with “I will be out of the province until June 7, 2004, and upon my return I undertake to forward to you the above noted undertakings.” It should not be forgotten that Mr. Saberi had possession of the Molega Lake property at this time.

[16] On June 24, 2004 the Mueller’s counsel wrote to Mr. Saberi’s counsel inquiring “when might we expect your package with the cheques for the mortgage payments? The bank has called our client inquiring about the same.” On July 21, 2004 the Muellers’ counsel wrote again looking for the mortgage payments.

[17] On October 19, 2004 the Muellers' counsel wrote to Mr. Saberi's counsel with the following remarks:

You will recall that you were to hold the documents in escrow until you provided:

1. Original signed guarantee executed by your client
2. Postdated cheques for the mortgage payments to Scotia Mortgage Corporation for \$1,186.96 for June 1, July 1, August 1, September 1, and October 1, 2004
3. Your trust cheque in the amount set forth in the Statement of Adjustments enclosed with my closing letter
4. Confirmation that your client has arranged fire insurance, with loss payable to Scotia Mortgage Corporation and Kreissparkasse Esslingen, as their interest may appear.
5. Your cheque in payment of our account

We are still awaiting a response from you. Please advise as to the status immediately.

[18] On October 19, 2004 Mr. Saberi's counsel wrote to Mr. Saberi's in house corporate counsel stating "I have repeatedly requested of your office the escrow

documents noted in Mr. Taylor's letter in order to close this transaction. Kindly check with Mr. Saberi and advise without further delay."

[19] On November 15, 2004 the Muellers' counsel wrote to Mr. Saberi's counsel advising that the bank had commenced foreclosure proceedings on first mortgage on Molega Lake. He asserted this was the result of Mr. Saberi's "failure to provide the cheques." It was in this letter that the Muellers' counsel first suggested a breach and the possibility that the transaction was at an end.

[20] It is not disputed that the Muellers' counsel released the \$50,000.00 in June, 2004. It is the Muellers' position that all escrow conditions had been met and that the release was appropriate. Mr. Saberi now argues that the only issue in this trial is "whether the defendants solicitor was entitled to release to the defendants the \$50,000.00 delivered to him in escrow in anticipation of the closing of the transaction." He further states in his post-trial brief:

The evidence adduced at trial in documents contained in our exhibit book made it abundantly clear that the \$50,000.00 was delivered to the Defendant's solicitor in escrow pending completion of transfer of the "Property" at 501 Uhlmad's Point Road, Molega Lake. That closing never took place so the escrow condition was never met and the funds should not have been released to the Defendants. They should have been returned to the solicitor for the Purchaser (the Plaintiff).

[21] The parties adduced oral and documentary evidence for the period November 15, 2004 until April 15, 2005. The correspondence deals with Mr. Saberi's counsel attempting to provide the escrow items in dribs and drabs. It also indicates efforts by Mr. Saberi to keep the transaction alive by seeking extensions. It is not necessary to review this evidence herein as such is not necessary to decide this case.

[22] I find that Mr. Saberi was not able or willing to close the condominium side of the transaction and therefore his guarantee required him to pay the \$300,000.00. That personal guarantee of June 2004 stipulated that the \$300,000.00 would be paid to the Muellers no later than January 31, 2005.

[23] The original agreement of Purchase and Sale stipulated that the latest closing date for the condominium unit would be ten (10) days after registration. The evidence establishes that registration took place on or before January 11, 2005. The evidence satisfies me that Mr. Saberi was unable or willing to close on the condominium on either of those dates and therefore the \$300,000.00 guarantee was due as of January 31, 2005.

[24] Mr. Saberi was unable to convey the condominium on either date because he no longer owned the stipulated unit (1010). Exhibit 13 is an Agreement of Purchase and Sale dated August 14, 2004 and relating to unit 1010. Exhibit #16 is a Warranty Deed for unit 1010 dated January 11, 2005 into the same individuals. I find that the plaintiff attempted to get around this by advising the Muellers there had been an “administrative error” and the agreement should have referenced unit 1001. Mr. Saberi’s failure to live up to this side of the deal caused the Muellers to be suspicious of this explanation and they ended the entire transaction.

[25] I find that the Muellers were entitled to the release of the \$50,000.00 after June 4, 2004. The Agreement of Purchase and Sale states that the occupancy fee “shall be paid on the closing date of the property.” The letter of May 21, 2004 enclosing the \$50,000.00 stipulated that “the \$50,000.00 occupancy fee is to be held in escrow until we receive the following:”. The escrow grew out of the latter. I find as a fact that the terms of that escrow were met when the documents and undertakings were provided on June 4, 2004.

[26] Mr. Saberi enjoyed possession of this property for almost one year. The Muellers provided evidence that satisfied me that this was not an unconscionable amount. I dismiss the plaintiff's claim for a return of the \$50,000.00 occupancy fee.

[27] The plaintiff claimed other damages its Statement of Claim. No evidence in support of these items was put forward and I therefore dismiss those claims.

[28] The defendants advanced a counterclaim but called no evidence in support. The counterclaim is dismissed.

[29] I will hear the parties on costs should they not be able to agree.

J.